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Appellee's Brief 1975-SC-0970

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APPELLEE'S BRIEF

552 SW 2d 660

SUPREME COURT OF KENTUCKY

FILE NO. 75-970

FRANKLIN RALPH ROARK, JR. — APPELLANT

VS. — APPEAL FROM BOONE CIRCUIT COURT
HON. SAM NEACE, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief for Appellee has been mailed, postage prepaid, to Hon. Sam Neace, Judge, Boone Circuit Court, Courthouse, Burlington, Kentucky 41005; Hon. Willie Mathis, Commonwealth Attorney, Courthouse, Burlington, Kentucky 41005; and Hon. Jack Emory Farley, Public Defender, Commonwealth of Kentucky, 625 Leawood Drive, Frankfort, Kentucky 40601, this 15th day of January, 1976.

Robert W. Hensley
Assistant Attorney General

FILED
JAN 15 1976
Marina Layne Collins
CLERK
Supreme Court Of Kentucky

TABLE OF CONTENTS AND AUTHORITIES

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BRIEF FOR APPELLEE

MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTION PRESENTED

WHETHER OR NOT ERROR OCCURRED WHEN OFFICER STAMPER TESTIFIED, UPON A QUESTION BY THE COMMONWEALTH AS TO THE OFFICER HAVING READ ANYTHING TO MR. ROARK THAT WASN'T IN THE STATEMENT(i.e. A CONFESSION READ INTO EVIDENCE BY THE OFFICER MOMENTS BEFORE): "NO, OTHER THAN THE WARRANTS...."?

COUNTERSTATEMENT OF THE CASE

On the 3rd day of June, 1975, the grand jury of the Boone Circuit Court filed its indictment with the clerk of that court charging Franklin Ralph Roark, Jr. with the offense of rape in the first degree, KRS 510.040. Transcript of the Record (hereinafter cited as T.R.) p. 1.

During the trial of the case three (3) witnesses were called to the stand, two (2) for the Commonwealth, the victim, Miss Pamela Sue Siffel, and the arresting officer, Officer Don Stamper and one (1) for the defense, the indictee, Franklin Ralph Roark, Jr.

The testimony of Miss Siffel was that she was raped by the defendant, Franklin Roark, who, she testified, upon approaching her out of the dark said: "Be quiet, don't move, or I will blow your head off." Transcript of the Evidence (hereinafter cited as T.E.) p. 11. Miss Siffel also testified that it felt like he pressed a gun at the base of her head at that time. T.E. p. 11-12. Miss Siffel also testified to penetration. T.E. p. 12.

Officer Stamper was called to the stand and it is his testimony which has served as the basis of this appeal. Officer Stamper had arrested Franklin Roark and had taken a statement from him. The statement is actually a confession, its principal variation from Miss Siffel's testimony being, in effect, that penetration did not occur. (This statement may be found in the very back of the bound volume of the transcript of the evidence.)

During Officer Stamper's direct examination the Commonwealth asked: "At the time the statement was taken, how long had you been interrogating Mr. Roark?" Officer Stamper was answering: "He had been in the custody of the Kenton County..." when the defense objected. The trial court sustained the objection and admonished the jury to disregard that statement. T.E. p. 22-23.

Later during redirect examination by the Commonwealth of Officer Stamper, the following question was asked: "Did you read anything to Mr. Roark prior to this signature that wasn't on the statement that you read?" Officer Stamper answered: "No, other than the warrants..." However, it appears from the stenographer's transcript that Officer Stamper never finished his sentence for thereupon the Commonwealth asked: "You didn't read it any different when he signed it than you read it here today?" Officer Stamper answered: "No." T.E. p.28.

Although the defense made no objection at that time, a motion for mistrial was made in chambers after the close of the Commonwealth's case which immediately followed the last cited question to and answer by Officer Stamper. T.E. p. 28. Following the overruling of this motion, as well as the motion for a directed verdict of acquittal, T.E. p. 29-30, Franklin Roark was called to the stand. (It is the above two passages of testimony which appellant, Mr. Roark, argues as reversible error.)

Franklin Roark's testimony, in essence, was that at the time he accosted Miss Siffel he did not have a gun but a rock which he let go before he got up to her. T.E. p. 31. Mr. Roark testified to sexual contact at least, but denied penetration due to his inability to achieve erection. The Commonwealth however points out that although Mr. Roark denied penetration, due to inability to achieve an erection, Mr. Roark did admit to an ejaculation. See Mr. Roark's testimony while under direct examination, T. E. p. 20-32.

Nevertheless, the jury, after being instructed on first degree rape and a lesser included offense, first degree sexual contact, found the defendant guilty of the principal offense charged and fixed his punishment at ten (10) years, T.R. p. 3-6, and Judgment was entered accordingly, T.R. p. 8.

ARGUMENT

ERROR - OR AT LEAST ERROR OF REVERSIBLE MAGNITUDE - DID NOT OCCUR WHEN OFFICER STAMPER TESTIFIED, UPON A QUESTION BY THE COMMONWEALTH AS TO THE OFFICER HAVING READ ANYTHING TO MR. ROARK THAT WASN'T IN THE STATEMENT (i.e. A CONFESSION READ INTO EVIDENCE), "NO, OTHER THAN THE WARRANTS...."

First, the Commonwealth points out that although appellant's brief on p. 3 reiterates two passages of testimony by Officer Stamper,

it is only the passage concerning "No, other than the warrants..." with which we are here concerned. It is only this passage with which the appellant's brief takes issue, and properly so. The first passage of Officer Stamper's testimony concerns the defendant's custody in the Kenton County jail. There was an objection, sustained by the trial court, followed by an admonition. No other objection was forthcoming from the defense as to this passage of testimony. T.E. p. 22-23. In Brown v. Commonwealth Ky., 449 S.W.2d 738 (Oct. 10, 1969; reh. den. Feb. 27, 1970) the Kentucky Court of Appeals affirmed a conviction for involuntary manslaughter. In Brown, the Court stated (p. 741):

> Appellant's fourth argument is that she was prejudiced by failure of the trial court "to declare a mistrial and discharge the jury on the ground that repeated references were made by the prosecution to other deaths."
>
> Appellant made timely objections to these references to other deaths, and the trial court sustained these objections. Also when appellant sought an admonition, one was given. Appellant was apparently satisfied by the action of the trial court in that she made no motion to declare a mistrial or to discharge the jury. There was no error. Taylor v. Commonwealth, Ky., 386 S.W.2d 716 (1966); RCr 9.24 and 9.26; also Taylor v. Commonwealth, Ky., 432 S.W. 2d 805 (1968); and RCr 9.22.

To the same affect is Taylor v. Commonwealth, Ky., 386 S.W.2d 716 (1965) wherein the Kentucky Court of Appeals affirmed a conviction for aiding and abetting armed robbery of a bank. In the case appears the following language (at p. 716-717):

> Appellant next contends that the Commonwealth's Attorney made an improper and prejudicial argument to the jury. The record reveals that the trial judge promptly admonished the jury to disregard the statements which appellant now claims were prejudicial. Since no motion was made for a discharge of the jury it would seem that appellant was satisfied with the trial judge's admonition. Under the state of this record we are unwilling to hold that the substantial rights of the appellant have been prejudiced. RCr 9.24 and 9.26; also see Mitchell v. Commonwealth, Ky., 280 S.W.2d 189.

Since Mr. Roark made no other motion at the time following the passage of testimony concerning custody, it is the position of the appellee, and one which this Court is asked to consider, that Mr. Roark "was apparently satisfied by the action of the trial court." Therefore, it is the appellee's position, if the Supreme Court of Kentucky accedes to the foregoing, that the issue in this case is whether or not error of reversible magnitude, if error at all, occurred upon the testimony concerning the reading of the "warrants" to Mr. Roark. It is the position of the appellee that such error did not occur.

In support of appellee's argument that the statement by Officer Stamper concerning the "warrants" was not of reversible magnitude, if error at all, the Commonwealth will review those cases cited by appellant in its brief.

In Alexander v. Commonwealth, Ky., 450 S.W.2d 808 (1970), the defendant was being tried for a storehouse breaking occurring on April 8, 1968 at a radio service center. During the trial witnesses were permitted to testify that two other articles of stolen property were found in the possession of the defendant, one, a "3-M" music machine taken from a pizza parlor in 1967, the other, a camera, taken from the office of the local board of education in February, 1968. The defendant was not on trial for either of these latter two break-ins. In Cook v. Commonwealth, Ky., 379 S.W.2d 228 (1964), a rape case, the Commonwealth called to the stand an employer of the victim's husband, the victim, better than an hour after the crime, having told the employer of the rape. The employer, Mr. Butler, was permitted to testify in detail what he had been told by the victim. In Powell v. Commonwealth, Ky., 214 S.W.2d 1002 (1948) the defendant was being tried for murder. During the trial, over the objection of the defendant, the Commonwealth was permitted to prove that the defendant was a

deserter from the Army. As this Court noted: "This line of questioning was persistently indulged in by the Commonwealth's attorney." 214 S.W.2d at 1004. In Scamahorne v. Commonwealth, Ky., 357 S.W.2d 30 (1962) the defendant was being tried for carrying concealed a deadly weapon. While under direct examination and over the objection by defense counsel, the arresting officers were permitted to testify that the warrant of arrest which they had at the time they arrested Scamahorne was for "bank burglary." The opinion in the case reveals that when arrested on the charge Scamahorne disclosed to the officers the pistol in his possession. The Court of Appeals stated (p. 31): "The question of what the Barren County warrant was for was in no way pertinent to the particular offense which appellant was charged with having committed." In Turpin v. Commonwealth, Ky., 352 S.W.2d 66 (1961) the defendant was being tried for shooting at and wounding another with intent to kill. On the second morning of trial, but before commencing with the testimony in Turpin's case, but while the jury which had been empaneled was seated in the courtroom, the trial court proceeded to call the docket for the day. Included in that call of the docket were two other indictments returned against the same Mr. Turpin. One of these was for carrying a concealed deadly weapon, and in connection with this charge the Commonwealth's attorney moved for a peace bond, stating as a reason, that certain persons interested in that indictment were "'afraid of the defendant' because he always kept a pistol on or about him." Ky., 352 S.W.2d at 66. And in White v. Commonwealth, Ky., 515 S.W.2d 237 (1974) the Commonwealth's attorney, in open court, upon motion by the defense for a continuance because of the absence of a Mr. Harris, repeatedly referred to Mr. Harris as being on another indictment with Mr. White. Ky. 515 S.W.2d at 238.

In each of the above six (6) cases the Kentucky Court of Appeals reversed the conviction. It is the position of the Commonwealth that although the foregoing cases contain language appropriate to the appellant's argument, appellee directs this Court's attention to the apparent fact that the error in those six (6) cases presented the Kentucky Court of Appeals with situations in which the possibility of prejudice to the defendants therein was much greater than the possibility of prejudice to the appellant, Mr. Roark, in the case now before this Court.

It is the position of the appellee that this interjection of "warrants" is, or must be held to be, harmless error. On p. 5 of appellant's brief, last paragraph, in discussing Scamahorne, the appellant stated: "By holding that the trial court should have limited the inquiry to just the defendant's custody under a warrant, this Court implicitly acknowledged that, under such circumstances, the jury would infer that the custody and warrant were for the charged offense." Although the appellee grants it is speculative, it is possible that the jury could have thought "warrants" referred to various papers in the hands of the officers when they went to apprehend Mr. Roark on the rape charge.

The Commonwealth points out, also, that there was no dwelling on this word "warrants" by the prosecution. In fact it appears from the way in which the stenographer has typed up this passage of testimony that the officer never finished his statement but was interrupted, cut off you might say, by the Commonwealth:

> Q. Did you read anything to Mr. Roark that wasn't on the statement that you read?
>
> A. No, other than the warrants---
>
> Q. You didn't read it any different (etc. T.E.p.28)

It is also possible, though granted it is speculative, that the prosecution was surprised by Officer Stamper's response concerning "warrants." It would appear that the officer was interrupted before he was permitted to go any further. In Bellew v. Commonwealth, Ky., 477 S.W.2d 779 (1972), the Commonwealth had asked the defendant as to whether his civilian record was clean, and the appellant's response in that case was that he had been convicted of drunken driving and petit larceny. The Kentucky Court of Appeals noted that as to that question the Commonwealth conceded "the prosecutor went further than permitted by Cowan v. Commonwealth, Ky., 407 S.W.2d 695 (1966), and Cotton v. Commonwealth, Ky., 454 S.W.2d 698 (1970)" Ky. 477 S.W.2d at 732. With that position the Court of Appeals agreed and stated: "[T]he appellant's offenses were not felonies, but rather misdemeanors, and in Hensley v. Commonwealth, Ky., 258 S.W.2d 899 (1953), we held that it was reversible error to show that the defendant had been convicted of misdemeanors, citing cases." Nevertheless, Bellew's conviction was affirmed, and in language appropriate to the Commonwealth's argument in the instant case that the prosecution did not dwell on "warrants" and on the speculative possibility that the response was unexpected, the Court of Appeals in Bellew stated (p. 782):

> The Commonwealth contends that the error, if any, is not prejudicial since the prosecutor did not dwell on the misdemeanor convictions and elicited the information unexpectedly. We think in the circumstances this was harmless error. RCr 9.24 and Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

Based upon the foregoing, it is the position of the Commonwealth that this alleged error as to "warrants" must be held to be harmless. RCr 9.24.

CONCLUSION

On p. 5 of appellant's brief, at the top, there is reference to the testifying officer as "courtroom-wise." Perhaps, for the sake of argument, the officer is so wise. However, if the officer is courtroom wise, it might also be said that he, or any officer who would deliberately insert possible error into a trial, is appeal foolish. Otherwise, and the Commonwealth directs this court's attention, there would be, it appears, no other basis for an appeal in the instant case, as indeed there is no other basis for the proof of guilt is convincing beyond a reasonable doubt.

WHEREFORE, the Commonwealth moves that the appeal be dismissed and the conviction affirmed.

Respectfully submitted,

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